



## CITY OF LODI

## COUNCIL COMMUNICATION

AGENDA TITLE: Report Relating to Unwelcome Advertising/Solicitations  
MEETING DATE: November 20, 1991  
PREPARED BY: City Attorney

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RECOMMENDED ACTION: Council consideration and direction.

BACKGROUND INFORMATION: The topic of unsolicited distribution of literature on abortion has been discussed in recent City Council meetings, and the Council has directed that a report on the legal issues be prepared. Research has convinced me that the City's authority to regulate distribution of any material subject to First Amendment protection is very limited, and any attempt to single out literature on abortion would almost certainly be unconstitutional.

This situation is difficult because of the sincere beliefs on both sides of the issue. However, the fact remains that distribution of information on abortion (both for and against) is an activity protected by the First Amendment according to the U. S. Supreme Court (Bigelow v. State of Virginia 421 U.S. 809). This means that although certain information or photographs might be deeply disturbing to some people, the City is required to treat it the same as any other legally permissible form of free speech. Although "commercial" speech receives somewhat less constitutional protection than "pure" free speech, an ordinance on handbill distribution would be required to cover distribution of such literature in much the same way as handbills for a political candidate or advertisements for a supermarket.

Admittedly, Lodi presently has an ordinance prohibiting distribution of "advertising matter" on private property. Lodi Municipal Code Section 9.08.010 says in pertinent part:

"It is unlawful for any person to distribute or throw, or procure anyone to distribute or throw, upon any private yard, lawn, driveway, sidewalk, porch or steps of any residence ... or in or upon any motor vehicle or other vehicle in the city, any advertising sample, handbill, dodger, circular, booklet or other notice of commercial advertising ..."

APPROVED: \_\_\_\_\_

THOMAS A. PETERSON



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This ordinance has been on the books for many years. However, more than a year ago, I advised City departments that this ordinance was probably unconstitutional and recommended against enforcement. This was based on such cases as Martin v. City of Struther 319 U.S. 141, and Van Nuys Publishing Company v. City of Thousand Oaks 97 Cal.Rptr. 777. In the latter case, the California Supreme Court overturned a city ordinance much like Lodi's because it violated free speech rights. Ordinances even less restrictive on free speech, such as a limit on canvassing by civic groups after 6:00 p.m. have been overturned (Connecticut Citizens Action Group v. Town of Southington 508 F.Supp. 43).

It has also been suggested by citizens that all literature of this nature be first inspected and certified for distribution by some public officer such as the city clerk. This would also probably be unconstitutional.

Where the content of public communication must first be cleared with a government censor, it probably constitutes "prior restraint" and may violate First and Fourteenth Amendment guarantees (Largent v. Texas 318 U.S. 418). Courts have said repeatedly that any benefits of such censorship are outweighed by the risk to constitutional guarantees of the right to speak one's mind.

Questions have also arisen over whether graphic photos of aborted fetuses are "obscene". While they may be highly offensive to some people, I do not believe this type of literature can be called "obscene" in a legal sense.

Penal Code Section 311(a) defines "obscenity" as follows:

" ... (the) matter taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken **as** a whole, depicts or describes in a patently offensive way sexual conduct; and which, taken as a whole, lacks serious literary, artistic, political, or scientific value." (emphasis supplied)

This definition refers specifically to sexual conduct. It is fairly clear (at least to me) that this definition does not include the photos found in abortion literature.

This does not mean the City cannot adopt reasonable "time, place and manner" regulations on distribution of advertising or literature in general (see Martin v. City of Struther at page 146, 147). However, it should apply uniformly to all material, from abortion literature to ads for gardening services. Courts have said repeatedly such ordinances must be "content-neutral".

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The Municipal Code at present contains Section 9.16.050 which prohibits door to door "peddling" or "solicitation" **by** salespeople for commercial purposes where the resident has posted an appropriate sign. It may **be** possible, if desired, to amend that statute to include non-commercial handbill distribution, as long as **it** was done in a "content-neutral" fashion.

Council direction is respectfully requested.

FUNDING: N/A

  
~~Bob McNatt~~

City Attorney

BM/vc